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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-394

No. COA20-713

Filed 20 July 2021

Wake County, No. 19 CRS 204897

STATE OF NORTH CAROLINA

v.

THEODORE WILLIAMS, JR., Defendant.

Appeal by defendant from judgment entered 14 November 2019 by Judge Winston Miller Rozier in Wake County Superior Court. Heard in the Court of Appeals 26 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana M. Badwan, for the State-appellee.

Daniel M. Blau for defendant-appellant.

GORE, Judge.

¶ 1

Defendant Theodore Williams, Jr. appeals from judgment entered upon jury verdicts of guilty for possession of marijuana paraphernalia, felony maintaining a vehicle, and felony possession of marijuana. On appeal, defendant argues the trial court erred by failing to appoint counsel or secure a proper waiver of counsel from defendant, in violation of N.C. Gen. Stat. §§ 15A-942, 15A-1242, and his rights under

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Article I, Section 23 of the North Carolina Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution. Defendant further argues that the trial court erred by failing to dismiss the charge of maintaining a vehicle where the State's evidence was insufficient to sustain a conviction. Defendant also argues the trial court committed plain error by incorrectly instructing the jury on the offense of maintaining a vehicle. Additionally, defendant contends the trial court erred in determining his prior record level for sentencing purposes. Finally, defendant argues the trial court erred in issuing his sentence.

¶ 2 We conclude that defendant is entitled to a new trial because the trial court did not ensure defendant validly waived his right to assistance of counsel prior to trial.

I. Background

¶ 3 On 14 March 2019, defendant was arrested for possession with the intent to sell or deliver marijuana and misdemeanor possession with intent to use drug paraphernalia. The next day, on 15 March 2019, defendant waived his right to counsel before the District Court. However, at his next court date defendant submitted an affidavit of indigency so that he could receive a court-appointed attorney. On 2 April 2019, the trial court appointed defendant counsel, but his appointed counsel withdrew on 15 May 2019, citing an inability for counsel and defendant to “reach an agreement regarding case strategy.”

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¶ 4

On 13 August 2019, defendant was indicted for possession with intent to sell or deliver marijuana, possession of drug paraphernalia for marijuana, keeping and maintaining a vehicle for keeping or selling controlled substances, and possession of marijuana. The case was transferred to Superior Court. At arraignment on 19 September 2019, the Superior Court judge did not address defendant directly about his appearance without counsel. At arraignment, when the trial court asked defendant if he wanted to waive a formal reading of the indictment, defendant responded “I don’t understand, sir. What do you mean?” The prosecutor then read defendant the indictment. The trial court then asked defendant how he plead to the charges, and defendant responded, “Sir, I’m a flesh and blood man and I shall not plead;” the court noted he was pleading not guilty.

¶ 5

Defendant’s case came on for trial on 12 November 2019. Before the trial court addressed pretrial matters, the trial judge had defendant formally waive his right to assistance of counsel in Superior Court. At this time defendant stated that he was defending himself *propria persona*.¹ Defendant’s case proceeded to trial, and the jury

¹ In North Carolina *propria persona* and *pro se* are synonymous. See *State v. Thomas*, 331 N.C. 671, 677, 417 S.E.2d 473, 477 (1992); see also Propria Persona, Black’s Law Dictionary (8th ed. 2004). *In propria persona* was formerly used to distinguish an unrepresented individual who appeared before the court challenging the court’s jurisdiction over them, thus not consenting to jurisdiction by appearing, from a *pro se* individual who represents themselves before the court and who the court either properly has jurisdiction over or has consented to jurisdiction of the court. See *United States v. Goldberg*, 937 F. Supp. 1121, 1125 n.1 (M.D. Pa. 1996). However, this distinction has since eroded. *Id.*

returned a verdict of not guilty for possession with intent to sell or deliver marijuana, and guilty for possession of marijuana paraphernalia, felony maintaining a vehicle, and felony possession of marijuana.

II. Discussion

¶ 6 On appeal, defendant argues that (1) the trial court erred by failing to appoint counsel or secure a proper waiver of counsel, (2) the State's evidence was insufficient to sustain a conviction on the charge of maintaining a vehicle, (3) the trial court erred in its jury instruction for the offense of maintaining a vehicle, (4) the trial court erred in determining defendant's prior record level, and (5) the trial court erred in issuing defendant's sentence. We conclude the trial court failed to obtain a proper waiver of counsel, and therefore, defendant is entitled to a new trial.

¶ 7 This Court reviews cases addressing a waiver of counsel *de novo*. *State v. Lindsey*, 271 N.C. App. 118, 124, 843 S.E.2d 322, 327 (2020). "Under a *de novo* review this court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (cleaned up).

¶ 8 In North Carolina Superior Court, a defendant may proceed to trial without the assistance of counsel, and represent himself, once the trial judge makes thorough inquiry and is satisfied that defendant: "(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled; (2) Understands and appreciates the consequences of this decision; and

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(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.” N.C. Gen. Stat. § 15A-1242 (2020). Additionally, “[i]f the defendant appears at the arraignment without counsel, the court *must* inform the defendant of his right to counsel, *must* accord the defendant opportunity to exercise that right, and *must* take any action necessary to effectuate the right.” N.C. Gen. Stat. § 15A-942 (emphasis added).

¶ 9 In *State v. Sanders*, our Supreme Court found that § 15A-942 requires a trial court to inquire into a defendant’s indigency status if they are unrepresented at arraignment. 294 N.C. 337, 346, 240 S.E.2d 788, 793 (1978). In that case, the fact that the defendant had not been found indigent at prior court dates, before the arraignment, or that that defendant was represented by private counsel at trial, did not divest the trial court of its duty to conduct an indigency analysis to ensure that the defendant’s Sixth Amendment rights were not violated when the defendant appeared unrepresented at arraignment. *Id.* at 344–45, 240 S.E.2d at 792. “For failure of the trial judge to determine indigency and appoint counsel to represent defendant if indigent, the judgment must be vacated and a new trial ordered.” *State v. Morris*, 275 N.C. 50, 60, 165 S.E.2d 245, 251 (1969).

¶ 10 In the instant matter, defendant contends that his waiver was not knowingly and intelligently made because the trial court did not advise him in full under the statutory mandate before obtaining that waiver. Further, Defendant argues that he

never waived his right to counsel prior to trial. He argues that there is no indication that the trial court conducted the statutory inquiry or advised him of his right to counsel at arraignment.

¶ 11 The decision in *Sanders* is dispositive of this appeal. The record here does not indicate that the trial court at any time during the arraignment proceedings made inquiry into the question of defendant's indigency or non-indigency at that time. The trial court is required to make such an inquiry by N.C. Gen. Stat. § 15A-942 and the *Sanders* decision. Here, defendant had initially waived counsel before the District Court. However, once defendant requested and was appointed counsel, his initial waiver was rendered ineffective. When defendant appeared unrepresented at arraignment before the Superior Court no valid waiver of his right to counsel was in effect, and the court was required to inquire into his indigency status and decision to proceed *pro se* in accordance with § 15A-942 and *Sanders*. Because the trial court did not make such an inquiry, the trial court erred, and defendant is entitled to a new trial.

¶ 12 Our conclusion that the trial court erred when it failed to conduct a mandatory inquiry when defendant appeared at arraignment without counsel, or secure a proper waiver of counsel, is dispositive, therefore, it is unnecessary to address defendant's remaining issues on appeal.

III. Conclusion

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¶ 13 For the foregoing reasons, the verdicts and judgments are vacated, and the case is remanded for further proceedings in accordance with this opinion and a new trial.

NEW TRIAL.

Judges DILLON and CARPENTER concur.

Report per Rule 30(e).